M VASAGAM MUTHUSAMY

v.

KESATUAN PEKERJA-PEKERJA RESORTS WORLD, PAHANG & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-04-6-03]
12 SEPTEMBER 2005

LABOUR LAW: *Employment - Contract of employment - Employer decided not to extend employee's contract - Whether contract a genuine fixed-term contract or a permanent contract - Whether employer had a right to not renew contract - Whether principle in Han Chiang High School/ Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, W. Malaysia & Anor applicable - Whether Industrial Court or High Court had erred in reaching their respective decisions*

This dispute between the appellant and the first respondent was initially adjudicated by the second respondent under the Industrial Relations Act 1967 resulting in an award dismissing the claim of the appellant. The appellant then went by way of *certiorari* proceedings before the learned High Court judge to quash the award. His application was unsuccessful; hence, the present appeal by him against the decision of the learned judge. It was not disputed that the appellant's contract of employment with the first respondent was extended every year up to 15 April 1996, until the first respondent issued a letter dated 14 April 1996 not renewing the appellant's contract. The primary issue to be resolved in this appeal was whether the appellant's contract of employment was a genuine fixed-term contract or a contract which was of a permanent nature but dressed up as a fixed-term contract as so found in the case of *Han Chiang High School/Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, W. Malaysia & Anor.*

Held (dismissing the appeal):

[1] The learned chairman of the second respondent had found that the appellant's contract of employment was a genuine fixed-term contract and that the first respondent therefore had a right to not renew the said contract upon expiry. This was a pure finding of fact based on the evidence before the second respondent. The learned High Court judge, mindful of the fact that the proceeding before him was not in the nature of an appeal to review the findings of the second respondent, had correctly approached the matter in judicial review with a view to discover any procedural impropriety, illegality or irrationality on the part of the second respondent in arriving at the decision so as to have exceeded its jurisdiction in the matter, and had affirmed the finding of the second respondent. Having considered the case of *Han Chiang (supra)*, this court was in total agreement with the learned judge that the facts of the appellant's case did not fit the principle laid down therein. They were clearly distinguishable. There was an ulterior motive behind the fixed-term contract in *Han Chiang (supra)* that was absent in the contract entered into between the appellant and the first respondent. This court agreed with the second respondent and the learned judge that the contract in the present case was a genuine fixed-term contract terminable upon the expiry of the fixed-term agreed upon. No two sets of facts are alike and each case is to be decided on its own facts before the tribunal called to adjudicate the matter. On the facts of the appellant's case, neither the second respondent nor the learned judge, in particular, had committed any error in arriving at the decision. (pp 99 g-h & 100 a-f)

Case(s) referred to:

Han Chiang High School/Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, W Malaysia & Industrial Court of Malaysia [1990] 1 ILR 473 ***(dist)***

Terry v. East Sussex County Council [1997] All ER 567 ***(dist)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1), (3)

For the appellant - S Thantha Balan (Rajaswari Karrupiah with him); M/s Zul Rafique & Partners

For the respondent - En Ramadass; M/s Ramadass & Assoc

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-39-1999]

Reported by Suresh Nathan

JUDGMENT

Abdul Kadir Sulaiman JCA:

This matter of dispute between the appellant and the first respondent first came to be adjudicated by the second respondent under the Industrial Relations Act 1967 (the Act) resulting in the award dismissing the claim of the appellant. The appellant then went by way of a *certiorari* proceedings before the learned High Court Judge to quash the award. Unsuccessful, his application was dismissed by the High Court with costs. Hence, this appeal before us against the said decision of the learned judge. We heard the appeal and on 23 March 2005, we also dismissed it with an order that the costs should follow the event. We now provide our reasons for the decision we made.

The jurisdiction of the second respondent flows from the operation of s. 20 of the Act 1967. It states:

> (1) Where a workman, … considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; …
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

It is our view that the reference of the representations of a workman under s. 20(1) of the Act to the Industrial Court under subsection (3) for its award, must relate to an alleged dismissal of the workman from his employment with his employer for the Industrial Court to determine whether that alleged dismissal was with or without just cause or excuse. If at the proceedings had with the Industrial Court pursuant to the reference there was a finding that there was in fact no dismissal as alleged, then whatever happened between the employer and the workman leading to the so called 'dismissal' should not be the concern of the Industrial Court. Those matters would clearly come outside its jurisdiction under s. 20 of the Act. Unless there is agreement over the fact of dismissal having taking place leading to the representations, it is the duty of the Industrial Court to make a primary finding as to whether or not there is a dismissal having taken place in respect of the workman by his employer. If there is a finding that there was in fact no dismissal having taken place, then the award must necessarily be in favour of the employer however dissatisfied a workman

is over his relationship with his employer over their service contract. On the other hand, if the finding is one of dismissal, only then be the duty of the Industrial Court to make a further inquiry to enable it to come to a decision in the form of an award as to whether that dismissal was with or without just cause or excuse.

In the matter in this appeal before us, there was a contract of employment between the appellant and the first respondent. The fact that the appellant is a workman and the first respondent is the employer is not in dispute. The primary issue to be determined is whether the ceasing of the employment of the appellant with the first respondent consequent upon the issue of the letter dated 14 April 1996 by the first respondent to the appellant amounts to a dismissal within the ambit of the Act. A copy of the letter is at p. 315 of the Appeal Record which is as follows:

RE EXPIRY OF FIXED TERM CONTRACT

> Our record shows that your fixed term contract expires on the 15th April 1996. The Executive Council has decided on 13th April 1996 at its Executive Council meeting not to extend the term of your fixed term contract dated 15th April 1993 and its subsequent extension. Accordingly, we hereby give you formal notice that we shall not extend your fixed term contract.
>
> In view of the lack of notice, we shall pay you three (3) months salary in lieu of notice in accordance with the terms and conditions of your fixed term contract.
>
> We would like to take this opportunity to wish you all the best in your future undertakings.

The contract of employment, a copy of which is at p. 264 of the Appeal Record is as follows:

Re: OFFER OF EMPLOYMENT

> We have pleasure in offering you the position of Executive Secretary of Resorts World Employees Union with effect from 15th April 1993.
>
> **Salary**
>
> Your salary shall be $1,500/- per month.
>
> **Job Assignment**
>
> You will be responsible for all administration work and to attend to all Meetings with the Management pertaining to members grievances, disputes and Collective Bargaining on behalf of the Resorts World Employees Union.

Working Arrangement

Your working hours are flexible, however, there may be occasions when your services may extend to late evenings to complete meetings with the Management or work requirements. You will, however, endeavour to be present in the Union House three times in the week.

Accomodation

The Union will provide you free accommodation at the Resort.

E.P.F and SOCSO

You are jointly liable with the Union for monthly contribution to the EPF and SOCSO at rates prevailing for the time being.

Duration of Employment

This employment is for a period of one (1) year and subject to renewal at the discretion of the Resorts World Employees Union.

Notice Period

The Notice period for termination of employment will be three (3) months by either party or three (3) months salary in lieu of such notice.

Bonus

You will be entitled to annual bonus payment of two (2) months last drawn basic salary in accordance with the Resorts World Employees Union Staff terms and conditions of service.

Transport Allowance

You will be granted a transport allowance of $22/- per trip as applicable to the EXCO Members of the Union in the event you are wanted up in the resort except on your normal working days.

Meal Allowance

The Union will pay you a meal subsidy of $100/- per month currently applicable to employees of the Union.

Besides the above, your terms and conditions of employment would be in line with the Collective Agreement between Resorts World Employees Union and Resorts World Berhad together with any Industrial Court Award governing the terms and conditions of employment.

If you accept the above terms and conditions, please sign hereinbelow your acceptance. Meanwhile, we extend to you our warm welcome to your joining the Resorts World Employees Union.

Yours Sincerely,

Resorts World Employees Union

Sgd: …
(Ong Hock Lee)
Hon. Secretary

I, M.M. Vasagam (I.C. No. 3996768) hereby accept the above terms and conditions.

Signature: sgd: …
Date: 15th April 1993.

It is not in dispute that this contract of employment of the appellant with the first respondent was extended every year up to 15 April 1996 until the issue of the letter of 14 April 1996 mentioned earlier. This must have been done pursuant to the discretion given to the first respondent to renew the fixed term one (1) year contract as contained under the clause on the duration of employment contained in the contract of employment of 15 April 1993. A copy of the award of the second respondent is to be found beginning at p. 442 of the Appeal Record. Having heard and analysed the evidence put before him, the learned chairman of the second respondent at p. 443 said:

> It therefore fell within the purview of the Court to decide on this issue whether in this particular case concerning the Claimant, it was a genuine fixed term contract, or whether it fell within the exception of the celebrated case of HAN CHIANG HIGH SCHOOL and NATIONAL UNION OF TEACHERS IN INDEPENDENT SCHOOL WEST MALAYSIA (Award No. 306/1988) (that is an exception to the provision of Section 11 Employment Act on fixed term contracts).

Then at p. 448 he continued:

> On the question of unreasonableness on the part of the Union not to renew the Claimant's contract after the second renewal, the learned Claimant Counsel quite rightly pointed out a number of errors and irregularities in the deliberations of the Exco meeting leading to the said decision – exhibit COA-15.
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> …
>
> Whilst the Court will at once agree that such an irregularity may tantamount to an error in law, this issue will hinge upon the ultimate question whether the contract was a genuine fixed-term contract of employment in the first place, or in reality a permanent contract disguised or dressed up as a fixed-term appointment.

Having analysed the evidence before him, at p. 450, the learned chairman of the second respondent came to this conclusion:

That being the case, that it was a genuine fixed term contract of employment, in normal circumstances such a contract automatically comes to an end of itself, in the absence of express renewal. In normal parlance, there is neither a resignation nor a termination and the letter of notice not to renew the Claimant's contract in exhibit CLA-30 was not a letter of termination. It was simply a letter of non-renewal. Consequently, the errors and irregularities raised concerned the decision making process and has no bearing on the question of Claimant's contract coming to an end. It could have the effect of nullity if from the very beginning the question related to a termination proper, but not otherwise.

The further question of whether the President harboured ill-will or motive in not wanting to renew the Claimant's contract is of little consequence in the light of the Court's finding that it was a genuine fixed-term contract regarding the Claimant's appointment.

In good conscience and equity therefore, and on substantial merit of the case, there was no unlawful termination of the Claimant or a dismissal without just cause or excuse.

It was for that very reason, the claim of the appellant before the second respondent was dismissed leading to the certiorari application before the learned judge of the High Court which this appeal before us is all about.

Before us, the learned counsel for the appellant agrees that the primary issue to be resolved in this appeal is, whether the contract of employment of the appellant with the first respondent is a genuine fixed-term contract or a contract which was of a permanent nature but dressed up as a fixed term contract as so found in *Han Chiang High School/Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, W. Malaysia & Industrial Court of Malaysia* [1990] 1 ILR 473. It is his submission that the contract between the appellant and the first respondent is one of a permanent nature. As such, the second respondent had committed a jurisdictional error by not properly applying the principle laid down in that case.

This very issue was in fact strongly canvassed before the second respondent in the award proceedings, and before the learned judge in the certiorari proceedings. The learned Chairman of the second respondent found that the appellant's contract of employment with the first respondent was a genuine fixed term contract and therefore the first respondent has a right to not renew the said contract upon expiry. This is a pure finding of facts based on the evidence before it.

Before the learned judge, mindful of the fact that the proceedings before him was not in the nature of an appeal to review the findings of the second respondent, the learned judge had correctly approached the matter in judicial

review with a view to discover any procedural impropriety, illegality or irrationally on the part of the second respondent in arriving at the decision so as to have exceeded its jurisdiction in the matter. The learned judge in his judgment at p. 39 of the Appeal Record has this to say:

> I am of the opinion that this Court should be slow to interfere with the findings of the Industrial Court made on the facts of the case based on the credibility of witnesses … I think such a contention has no place in an application for judicial review, where it is trite law that findings of facts based on credibility of witnesses cannot be challenged … the Applicant failed to show how the Industrial Court committed an error of law in its decision-making process on the issue whether there was a genuine fixed term contract. … It is observed that in the *Han Chiang* case the Industrial Court made a finding that the system of fixed term contracts in the school was employed not out of a genuine necessity but as a means of control of the teachers concerned. The intention of the school was to rid itself of the Union, which was why the school relied on the fixed term contracts to flush out the teachers who were members of the Union. The *Han Chiang* case therefore can be distinguished from the instant case as in the instant case, the Industrial Court upon examining the facts of the case found that there was a genuine fixed term contract.

Having gone into the *Han Chiang* High School case ourselves, we are in total agreement with the learned judge that the facts of the appellant's case do not fit into the principle laid down therein. They are clearly distinguishable. There was an ulterior motive behind the fixed term contract in *Han Chiang High School* case which is absent in the contract entered into between the appellant and the first respondent. We agree with the second respondent and the learned judge that the contract in our present case is a genuine fixed term contract terminable upon the expiry of the fixed term agreed upon.

Terry v. East Sussex County Council [1997] All ER 567 cited to us in further support of the contention of the appellant is not at all relevant in deciding the issue before us. It is a decision based on a certain provision in a particular statute of England which is not at all of any similarity with the Act 1967 upon which the second respondent was called upon to adjudicate over the dispute between the appellant and the first respondent.

No two sets of facts are alike. Each case is to be decided purely on its own facts before the tribunal called upon to adjudicate on the matter. On the facts of the appellant's case we are satisfied that neither the second respondent nor the learned judge, in particular, has committed any error in arriving at the decision.

In the circumstances, this appeal was accordingly dismissed.